HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 465/04 (M/S)

Smt. Manorama Dobariyal Sharma Dehradun

VS

D.J. Dehradun and others

Approved for reporting.

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Not approved for reporting

Date of decision 05.10.2004

Initial of Judge

RESERVED

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 465 (M/S) of 2004

Smt. Manorama Dobariyal Sharma,
W/o Brahma Swaroop Sharma,
R/o Ajabpur Kalan,
Dehradun ……. Petitioner

Versus

District Judge, Dehradun
and others …….. Respondents.

……..

Sri Ramji Srivastava, Advocate, learned counsel for the petitioner
Standing counsel for the State
Sri V.K.Kohli, Senior Advocate, assisted by Mr.I.P.Kohli,Advocate for the private respondents.

Dated: 5th October, 2004

Hon. Rajesh Tandon J.

By the present writ petition the petitioners have prayed for quashing the order dated 17.05.2004 passed by the District Judge, Dehradun, while rejecting the application no. 45C2 dated 22.04.2004 filed in election petition no. 18 of 2003 Smt. Vinod Uniyal Vs. Smt. Manorama Dobariyal and others.

Briefly stated the petition under section 61 of the U.P.Nagar Mahapalika Adhiniyam, 1959 was filed challenging the election of the respondent no.1 as void and the petitioner be declared as elected to the post of Nagar Pramukh.

According to the case of the petitioner, he was one of the candidates for the Nagar Pramukh post and as a result of the declaration of the result the petitioner was declared as second in number and the respondent no. was declared elected. Respondent no.5 Smt. Vinod Nautiyal, therefore,

has filed the election petition. The petitioner has filed his written statement.

According to the case of the petitioner, the election petition does not show any cause of action and as such it was not maintainable.

During the pendency of the case, the petitioner has filed an application 45C2 praying for the adjudication of the preliminary issue to the effect as to whether the State Election Commission is necessary party in the election petition and further as to whether the election petition was defective for non-joinder of the party, then its effect?

Objections were filed by the respondent no.5 and a replication was filed.

On 17.05.2004 application was rejected, hence the present writ petition has been filed.

Counsel for the petitioner has referred order 1 Rule 13 of the Code of Civil Procedure. It reads as under:-

> "**13. Objection as to non-joinder or mis-joinder**- All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

A perusal of the order shows that the point in controversy has not yet been decided by the Court below as a preliminary issue, but the same has been deferred for

decision at the stage of final hearing in view of the Order 14 Rule 2 C.P.C.

Order 14 Rule 2 C.P.C. reads as under:

> **"2 Court may pronounce judgment on all issues**- (1) Notwithstanding that the case may be disposed of on preliminary issue, the Court shall, subject to the provisons of sub-rule (2),Pronounce judgment on all issues.
>
> (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-
> (a) the jurisdiction of the Court, or
> (b) a bar to the suit created by any law for the time being in force,
> and for that purpose may, if it thinks firt, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

A perusal of the aforesaid provision shows that the Court can frame the preliminary issue when the ingredients of aforesaid clause (a) are satisfied i.e. with regard to jurisdiction of the Court or a bar to the suit created by any law.

The Court below has observed that this question shall be decided alongwith the case itself. In view of the above, no prejudice has been caused to the petitioner and the plea is still open to the petitioner at the stage of the decision of the suit itself.

It has been held in 1988 AWC page 1428 as under:-

"Order XIV sub-clause (2) of the Code of Civil Procedure provides circumstances where discretion has been given to the Court in a suit to dispose of a particular issue as a premilinary issue. This rule does not apply in the case of suits filed in Provincial Small Cause Courts. Even if for the sake of argument it is taken that the general principles laid down in the Order XIV sub-clause (2) applies, then too the case would not be covered under the general

principle. The discretion to decide a preliminary issue has been given only in two cases where the issue relates to the jurisdiction of the Court or where a bar to the suit has been created by any law for the time being in force. This is not the case here."

After the amendement of 1976 to sub-rule (2) of Order 14, the bar in framing the preliminary issue, is limited to the jurisdiction of the court or to a bar to the suit created by any law for the time being in force In the present case, no such argument has been advanced so as to attract the provision of sub clause (2) of Order 14 Rule 2 C.P.C.

Similar view has been taken in Lufthansa German Airtlines Vs. Vij Sales Corporation-1988 (8) SCC 623 by the Apex Court. The observations of the Apex Court are quoted below:

> "This Court has also insisted that normally all issues should be decided while disposing of the suit. The amendment introduced in Order XIV Rule 2 of the Code of Civil Procedure by the Amendment Act of 2976, also provides that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule 2 of Rule 2, pronounce the judgment on all issues. Sub rule (2) of Rule 2 of Order XIV is an exception where a suit can be disposed of on the question of law only.
>
> After hearing learned counsel for the parties, we are of the opinion that the present case was not one of such suits which should have been disposed of on the preliminary issue. While deciding the question whether the suit was barred by limitation, the High Court had to examined the allegations made in the plaint and the stand taken by the appellant in the written statement. In our view, it shall not be proper for this Court to express any opinion on the finding recorded by the learned Single Judge on the question of limitation."

In view of the above, the writ petition being premature as the objections have yet to be decided. Order 1 Rule 13 being an independent provision, it does not affect the power

of the Court under Order 14 Rule 2 C.P.C. However, liberty is given to the petitioner to pray for framing the issue and the Court shall decide the same alongwith the case itself.

In view of the aforesaid observations, writ petition being premature is dismissed at this stage.

October 05 ,2004. **(Rajesh Tandon, J.)**

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